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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Marcus D., Jr., et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. T.D. et al., Defendants and Appellants.	D075167 (Super. Ct. Nos. J512403C-D)

APPEAL from orders of the Superior Court of San Diego County, Michael J. Popkins, Judge. Affirmed.

Emily Uhre, under appointment by the Court of Appeal, for Defendant and Appellant T.D.

Richard Lynn Knight, under appointment by the Court of Appeal, for Defendant and Appellant Marcus D., Sr.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Tahra Broderson, Deputy County Counsel, for Plaintiff and Respondent.

T.D. (Mother) and Marcus D., Sr. (Father) appeal from the juvenile court's orders sustaining the dependency petitions filed by the San Diego County Health and Human Services Agency (Agency) on behalf of their minor sons Marcus D., Jr. (Marcus), and M.D. and removing the boys from parental custody. The juvenile court also determined the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) did not apply. The parents' sole contention on appeal is that the ICWA ruling was in error. We deny the Agency's request to dismiss the appeal as frivolous, but agree the appeal lacks merit and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

The Agency filed dependency petitions under Welfare and Institutions Code section 300[1] in August 2018, when Marcus was five and M.D. was four. They alleged Father put out a cigarette on M.D.'s face; Mother used methamphetamine, including while the boys were in her care; and both parents had a history of domestic violence. An ICWA-010(A) form (Indian Child Inquiry Attachment) was attached to each boy's petition and indicated there was "no known Indian ancestry." At the time the petitions were filed, the boys were residing with maternal aunt, C.M., during the week.

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1 Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

In the detention report, the social worker stated she "inquired of the parents/relatives about the Indian status/heritage of the children," and ICWA did not apply. She explained she met with Mother and Father for in-person interviews, and they denied Native American heritage. The boys remained in C.M.'s care.

Mother and Father filed ICWA-020 forms (Parental Notification of Indian Status). Each parent checked the box for "I have no Indian ancestry as far as I know," and signed under penalty of perjury. They also submitted parentage inquiry questionnaires, which asked about Father's Native American heritage; the forms indicated no heritage. Mother also noted on her questionnaire that she was married to Clifton D. and they were legally separated.

At the detention hearing, Mother's and Father's attorneys reported they submitted the ICWA-020 forms indicating no Native American heritage. The court addressed Mother, stating, "[Y]our attorney has indicated to me that you have no Native American heritage. [¶] Is that correct, Mom?" She said yes. The court then asked Father, "And your attorney said the same thing about you, Dad; is that correct?" Father also said yes. The court found ICWA did not apply to the parents, and deferred a finding on Clifton until the Agency could investigate. The court ordered the boys be detained "either at Polinsky Center, a licensed foster home, an adjunct, or at the approved home of a relative, specifically, in this case, the maternal aunt C.M.—and that is where the children currently are . . . ."

The Agency provided its jurisdiction and disposition report, which confirmed the social worker "inquired of [Mother and Father] about the Indian status/heritage of the

children." The report elsewhere noted Mother stated her ethnicity was African-American, French, Italian, and Filipino, and Father said his ethnicity was Black.

At a settlement conference, Clifton appeared by telephone. He testified he was separated from Mother, the children were not his, and he did not want to participate in the case. The court excused him and stated, "At this time I do confirm Judge Popkins's previous finding [in August 2018], that both mom and father [D.] deny Native American Indian ancestry. Therefore, the Indian Child Welfare Act does not apply."

The juvenile court held a contested jurisdiction and disposition hearing in December 2018. The court found the petitions true by clear and convincing evidence, removed the children from parental custody, and ordered reunification services. The parents timely appealed.[2]

DISCUSSION

The parents contend the Agency failed to sufficiently investigate the boys' Native American heritage. They ask this court to remand the case so the juvenile court can order additional inquiry. We disagree, and reject this request.

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children

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2 Father's notice of appeal stated a possible issue was the "sufficiency of the evidence for jurisdiction." To the extent he intended to raise this issue, he does not address it here and we deem it waived. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived."].)

from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8 (*Isaiah*).) ICWA establishes "minimum Federal standards for the removal of Indian children . . . .' (25 U.S.C. § 1902.)" (*Ibid.*) They include "notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a).)" (*Id.* at p. 8.)

California's legislature has "enacted provisions that . . . mandate compliance with ICWA '[i]n all Indian child custody proceedings' (§ 224, subd. (b))." (*Isaiah*, *supra*, 1 Cal.5th at p. 9; see § 224, et seq.) Pursuant to these provisions, the court and county welfare department "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been[] filed is or may be an Indian child in all dependency proceedings . . . if the child is at risk of entering foster care or is in foster care." (§ 224.3, subd. (a).)[3]

"The circumstances that may provide reason to know the child is an Indian child include . . . the following: [¶] . . . A person having an interest in the child, including the child, . . . or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership . . . ." (§ 224.3, subd. (b)(1).) If the court or social worker "knows or has reason to know that an Indian child is involved,"

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3 2018 Assembly Bill No. 3176, which took effect on January 1, 2019, repealed and added section 224.3 and related section 224.2. We apply the statute in effect at the time of the juvenile court orders.

there is an obligation to inquire further and provide notice. (§ 224.3, subd. (c) [requiring further inquiry regarding possible Indian status]; 224.3, subd. (d) [requiring notice in accordance with § 224.2, subd. (a)(5)]; see § 224.2, subd. (a)(5) [notice shall contain, inter alia, names and contact information for grandparents and great-grandparents].)

The record reflects the Agency's inquiry efforts complied with ICWA's requirements. The parents indicated repeatedly that they were not aware of Native American heritage, including under penalty of perjury in their ICWA-020 forms and in response to questioning by the juvenile court. The parents also reported their respective ethnicities, and again did not indicate they were Native American. There was nothing to suggest to the Agency or court that further inquiry, as to the boys, extended family, or otherwise, would reveal Native American heritage. On this record, the juvenile court had no reason to believe Marcus and M.D. were Indian children and, therefore, properly concluded ICWA did not apply. (*In re A.B.* (2008) 164 Cal.App.4th 832, 843 (*A.B.*) ["When both biological parents deny any Indian heritage . . . there is no tribe to notify of the proceedings."].)

The parents' position that the juvenile court erred lacks merit. They contend the "statute requires inquiry be made of anyone with an interest in the child[ren]," including the children and extended family, and the juvenile court erred by failing to require the Agency to ask the boys and family members. We are not persuaded.

First, the parents cite section 224.3, subdivision (b)(1), which identifies the children and extended family as potential sources of information supporting "reason to know" the child is Indian. They contend, "So, the initial inquiry required the agency to

inquire of the children directly and extended family members." But they do not identify any authority holding that section 224.3, subdivision (b), or any other provision, imposes an affirmative obligation to seek out these potential information sources. (Cf. *In re S.B.* (2005) 130 Cal.App.4th 1148, 1161 ["as long as the social worker did inquire of the parents, and as long as the parents failed to provide any information requiring followup, she had no further duty of inquiry"]; *In re C.Y.* (2012) 208 Cal.App.4th 34, 41 [agency "must inquire as to possible Indian ancestry and act on any information it receives, but it has no duty to conduct an extensive independent investigation for information"].)[4]

Next, the parents cite the provisions requiring further inquiry and notice once the court and social worker have reason to know Indian children are at issue. (§§ 224.3, subds. (c), (d).) Those requirements did not apply here, because the parents reported they were unaware of Native American heritage and there was nothing else to suggest it might exist. The parents cite cases where courts reversed for further inquiry or notice, but all involved some indication of Native American heritage. (See *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 777-778, 786 [where parent indicated possible Indian heritage and that she received information from relative, failure to identify federally recognized tribe did not relieve agency of obligation to investigate]; *In re K.R.* (2018) 20 Cal.App.5th 701,

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4 On reply, the parents contend this appeal concerns statutory interpretation of section 224.3, subdivision (b)(1). We need not address this improperly presented issue, or other points first raised on reply. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].) Even if we did, their interpretation is not persuasive.

707-708 [information reflected father might have Cherokee heritage, but notices were inadequate and there was no evidence agency investigated paternal relatives]; *In re N.G.* (2018) 27 Cal.App.5th 474, 478-479, 481-482 [agency sent notices to certain tribes, but did not act on father's report of possible Cherokee heritage, interview paternal relatives, or ask mother about Indian ancestry].)

Finally, the parents contend the social workers had information about the parents' extended families and could have investigated as to ICWA. They note C.M. was interviewed, but not about Native American heritage. But they do not establish the Agency had any *obligation* to conduct such inquiries, particularly where both parents repeatedly denied (or at a minimum stated they were unaware of) Native American heritage.[5]

Even if there were a failure to investigate, the parents have not demonstrated prejudice. Courts distinguish "between violation of notice requirements imposed by ICWA itself . . . and violations of state standards for inquiry and notice that are higher than those mandated by ICWA . . . ." (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 653 (*Breanna S.*).) "Any failure to comply with a higher state standard . . . 'must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error.' " (*Ibid.*; see *A.B.*,

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5 The parents also contend generally that ICWA applies when a child was initially detained in foster care, but is ultimately placed with a relative. We need not resolve this issue, because the juvenile court did not determine ICWA could not apply here. Rather, it concluded it *did* not apply, and the record supports that finding.

supra, 164 Cal.App.4th at p. 839 [reversal not warranted if "noncompliance with the inquiry requirement constitutes harmless error"].)

Any error here was harmless. There is nothing to indicate the court's ICWA ruling would differ if the Agency interviewed the extended family or the young boys. (See *A.B.*, *supra*, 164 Cal.App.4th at p. 843 [ICWA inquiry error was harmless; mother disclaimed heritage in another proceeding, and "[a]lthough the form was for another child, considered with [father's] form in which he denied Indian heritage, it shows that A.B. necessarily has no such heritage."].) The parents were unaware of Native American heritage, and there is no reason to think other family members would offer differing accounts. As for the boys, we agree with the Agency that their knowledge of Native American heritage is unlikely to exceed that of their parents.

The parents' arguments on the issue of harmless error again lack merit. They contend the purported inquiry failure is "not subject to harmless error analysis," and "it is impossible to state that further inquiry would not alter the result," citing *In re E.H.* (2018) 26 Cal.App.5th 1058. In *E.H.*, the mother reported her paternal family had Native American heritage, but the agency did not establish it obtained her father's information or provided to the tribe. (*Id*. at pp. 1065-1066, 1073-1074.) The court determined that while the failure to notify the tribe was "arguably one of federal dimensions," even if the state standard applied, it could not conclude "further inquiry and noticing of the tribe would not alter the result" in light of mother's input about paternal heritage. (*Id*. at p. 1074.) In short, the court applied harmless error analysis—and, unlike here, a parent had indicated Native American heritage. The other cases the parents cite involve the

state of the record, which is not at issue, or are otherwise distinguishable. (See *K.R.*, *supra*, 20 Cal.App.5th at pp. 708-709 [agency could not rely on record that was "silent as to its investigative efforts"]; *N.G.*, *supra*, 27 Cal.App.5th at pp. 483, 485 [absent record of ICWA compliance efforts, court would generally find error prejudicial]; *In re A.G.* (2012) 204 Cal.App.4th 1390, 1397, 1400-1402 [error not harmless where, among other things, father reported Native American ancestry and was gathering information, but there was no indication agency followed up or interviewed paternal relatives]; *Breanna S.*, *supra*, 8 Cal.App.5th at pp. 643-644, 654 [mother reported Indian ancestry, and ICWA notice omissions were prejudicial under federal and state law].)

We conclude the juvenile court did not err in determining ICWA was not applicable and, even if it did, such error would be harmless. The Agency's request to dismiss the appeal as frivolous is denied.

DISPOSITION

The orders are affirmed.

GUERRERO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

AARON, J.